IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO.433/2007

1. Cesar Rego Fernandes;

2. Maria Vitoria Fernandes e Linhares,

3. Susan Fernandes Linhares;
All residents of House No. 133/1
Merces, Goa. ..... Petitioners.

V/s.

1. Angela Ninette Oliveira Fernandes;

2. Ruben Oliveira Fernandes;

3. Otto Oliveira Fernandes;

4. Celia Oliveira Fernandes;
All residents of House No.133/2,
Bhutem Bhat, Merces, Goa. ..... Respondents.

Mr. V. P. Thali, Advocate for the petitioners.

Mr. E. Furtado, Advocate for the respondents.

CORAM : R.S. MOHITE, J.

DATE : SEPTEMBER 13, 2007.

ORAL JUDGMENT :

Heard both sides. Rule. By consent, rule made returnable forthwith.

2. This petition impugns an order dated 23.8.2007 passed by the Civil Judge, Junior Division, at Panaji by which she has directed deletion of paragraphs 12, 13 and 27 to 33 of the affidavit-in-evidence filed by the plaintiffs. The said deletion has been directed on the footing that the evidence as contained in the examination-in-chief does not find place in the pleadings. Reliance has been placed upon a Judgment of this Court in the case of ***Anila Rege vs. Guruprasad M. Rage & Ors.***, reported in 2004(3) ALL MR 271 wherein this Court has held that in the absence of pleadings, evidence produced by the plaintiff cannot be considered. Reliance has further been placed upon a Judgment of the Apex Court in the case of ***Prataprai N. Kothari vs. John Braganza*** reported in (1999) 4 SCC 403, in which the Apex Court while dealing with a question of admissibility, observed that it was a settled law that in the absence of any plea, no evidence is admissible. That when there was no plea or issue on the question of title, no evidence whatever was admissible regard the same. Before the Apex Court, an application had been made for additional evidence under Order 41, Rule 27 C.P.C. in the appellate Court and this application was disallowed on the ground that this additional evidence was sought to be introduced on the question of title, even though there was no plea or issue regarding the title. Advocate for the petitioners refers to an unreported Judgment of a Single Judge of this Court

in the case of ***Communidade of Pilerne vs. The State of Goa and another*** passed on 21st June, 2007 in Writ Petition No.297 of 2007, in which the learned Single Judge held that where an objection at the stage of evidence was raised to the evidence being beyond the scope of the pleadings, no fault could be found with the ruling of the Court that the objection would be considered at the stage of appreciation of evidence.

3. In my view, none of the aforesaid Judgments are the authorities on the fact that the Court can strike out paras from an affidavit-in-evidence which is filed as examination-in-chief, by the parties. If, there is any statement in the affidavit which according to the opposing party is beyond the pleadings, then it is always open to such a party to put this to the witness in his cross examination. It is also open to the Court to consider the relevance and weightage to be given to any such statement in the examination-in-chief when there is no foundation laid in the pleadings. It would, however, not be correct to strike out paras in the affidavit itself. Such an application could not be supported by any provision of C.P.C.

4. In the circumstances, subject to the right of the original defendants to put questions to the witness in the cross examination about any portion in the examination not being found in the pleadings and subject to the right of

the Court to decide the question of relevance and weightage to be given to such pleadings, at the stage of disposal of the suit. Rule made absolute in terms of prayer clause (a).

R.S. MOHITE, J.

ssm